

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2002 Session

LAUREL ELISE CALHOUN v. MICHAEL DAVID CALHOUN

**Direct Appeal from the Chancery Court for Hawkins County
No. 13697 Hon. Thomas R. Frierson, II, Chancellor**

FILED APRIL 15, 2002

No. E2001-01242-COA-R3-CV

In this divorce action, the Trial Court granted the divorce pursuant to Tenn. Code Ann. §36-4-129, and ordered alimony and child support to wife. The marital property was divided and joint custody of the child was ordered with equal time to be spent with each parent. The husband essentially appeals all rulings. We affirm, as modified.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed, as Modified and Remanded.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

James H. Beeler, Kingsport, Tennessee, for Appellant.

Michael May, Kingsport, Tennessee, for Appellee.

OPINION

In this divorce action, the husband on appeal raises issues of grounds for divorce, custody of the child, the Trial Court's refusal to hear the child's testimony, award of child support and alimony, and the distribution of marital property of the parties. The wife seeks attorney's fees and expenses on the appeal brought by the husband.

The wife filed a Complaint for Divorce on June 11, 1999, setting forth that the parties had been married since December 1986, and that one child was born of the marriage on December

17, 1989. The divorce was sought on the grounds of inappropriate marital conduct and that the parties suffered from irreconcilable differences.

Following trial, the Trial Court declared the parties divorced pursuant to Tenn. Code Ann. §36-4-129(b), finding from the evidence that both parties were entitled to a divorce. In deciding the custody issue, the Court considered the factors listed in Tenn. Code Ann. §36-6-106, and found that the best interest of the child would be served by having a joint custodial arrangement with the wife designated as primary residential custodian. The Court determined that both parents had a loving and affectionate relationship with the child, and both could provide for his needs. The Court found that the then current alternating week schedule had provided the child with continuity, as well as a stable satisfactory environment in both homes. The Court concluded that due to the totality of the circumstances, the best interest of the child would be served by designating the wife as the primary residential custodian, although each parent had physical custody of the child an equal amount of the time.

The Court awarded child support to the mother, finding the husband earned \$4,250.00 per month gross, and that his guideline support obligation would be \$657.00 per month. The Court further found that this was a proper case for a downward deviation from the guideline amount, because the husband would be exercising more parenting time than contemplated by the guidelines. The husband was ordered to pay child support in the amount of \$472.50 per month.

In the division of marital property, the Trial Court found that the farm was the husband's separate property, but the wife was entitled to share in its increase in value, such that \$43,467.00 of the equity was determined to be marital property. Husband was awarded that amount as part of his division of the property, as well as vehicles, farm equipment, and a bank account and retirement account. The husband's share of the marital property was valued at \$104,081.00, and the wife was awarded the marital property in Kingsport where she resided, as well as her vehicle, furnishings, and retirement savings, such that her total share of marital property was valued at \$75,470.00. The Court then ordered that \$14,000.00 of the husband's retirement savings would be transferred to wife, so that the awards would be \$90,081.00 to the husband and \$89,470.00 to the wife.

The Court recognized that the wife had asked for alimony, and discussed the factors which had to be considered in determining if an award was appropriate. The Court found the wife earned \$25,000.00 per year working full-time, and the husband earned \$51,000.00 per year, and that economic rehabilitation for the wife was not feasible. Thus, the Court ordered the husband to pay \$200.00 per month for 36 months, classifying it as an "in futuro" award.

The husband argues that it was error for the Court to pronounce the parties divorced pursuant to Tenn. Code Ann. §36-4-129, which states:

The court may, upon stipulation to or proof of any ground for divorce pursuant to §36-4-101, grant a divorce to the party who was less at fault or, if either or both

parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

The evidence does not preponderate against the Trial Court's determination that both parties "contributed to the eventual disintegration of the marriage" such that it was proper for the Court to pronounce them divorced pursuant to Tenn. Code Ann. §36-4-129. *See Earls v. Earls*, 42 S.W.3d 877, 914 (Tenn. Ct. App. 2000).

Husband argues that the Trial Court erred in granting joint custody and/or in naming wife as primary residential custodian. Before the Trial Court, the husband acquiesced in the joint custodial arrangement, both in his oral testimony and in his proposed parenting plan. In any event, the evidence does not preponderate against the Trial Court's determination. The parties had utilized this arrangement throughout their separation, and both testified that it had worked well and that the child was happy with it. Tenn. Code Ann. §§36-6-411(e)(2)(1999) states that the court "may order that a child alternate his or her residence between the households of the parents for substantially equal intervals of time only if the court finds" that the parties have agreed to such an arrangement, and that it is in the best interests of the child.¹

The husband also takes issue with the Trial Court's designation of the wife as primary residential custodian. Tenn. Code Ann. §36-6-402(1)(1999) states that "primary residential parent" means the parent with whom the child resides more than 50% of the time. However, in this case, the time is divided equally between both parents. On the evidence, we find the Trial Court's determination appropriate. Both parents were encouraged to consult with one another regarding the child, but the Court stated the final decisions would be made by the wife.

In *Hansen v. Hansen*, 2000 WL 486808 (Tenn. Ct. App. April 26, 2000), the concept of "primary residential" parent was discussed, and this Court explained that this designation was based on the "time the child is under the legal care and supervision of each parent - - a concept which basically equates to the concept of residence." The Statute does not address this situation where the child's time is spent equally with each parent. Accordingly, the Court considered other factors, such as the wife's willingness to arrange her schedule, and the regularity of the wife's work hours. The evidence supports the Trial Court's findings, in making this mandatory designation.²

Husband argues that the Trial Court erred in refusing to hear the testimony of the parties' ten-year-old child regarding his custodial preference. Tenn. Code Ann. §36-6-411(e)(1)(M)(1999) states that the court "may hear the preference" of a child less than twelve years

¹ There is also a requirement that there be no limiting factors such as abuse, neglect, etc., none of which is applicable here.

² The court is also directed to order sole decision making authority to one parent when a parent is opposed to mutual decision making. Tenn. Code Ann. §36-6-411(d)(2)(C). In this case, the husband was clearly opposed to mutual decision making.

old, but the statute makes clear that such testimony is discretionary. Moreover, both parents were allowed to testify that the child was happy with the alternating week schedule and that he wished for this schedule to continue. We find no error in the Court's refusal to allow the child's testimony.

Next, the husband takes issue with the Trial Court's award of \$472.50 in child support to the wife. The Court found that the husband earned \$4,250.00 per month gross, and that his guideline support obligation would be \$657.00 per month. The Court then found that this was a proper case for a downward deviation, because the husband would be exercising more parenting time than contemplated by the guidelines. The Court ordered the husband to pay child support of \$472.50 per month. The evidence supports the Trial Court's finding as to husband's gross monthly income and the proper guideline support based upon the income of \$657.00 per month. The evidence established that the wife earned a gross monthly income of \$2,083.00, which would require guideline child support of \$350.00 per month. In reaching its determination, the Trial Court relied on *Casteel v. Casteel*, 1997 WL 414401 (Tenn. Ct. App. July 24, 1997), which applied a mathematical formula to determine the obligor's child support amount based upon additional visitation which had been awarded over and above the amount contemplated by the guidelines. However, the *Casteel* Court noted that this formula could be utilized when the parties had relatively equal income. *Id.* Such is not the case of the parties herein. Other cases revising guideline support include *Hansen v. Hansen*, 2000 WL 486808 (Tenn. Ct. App. April 26, 2000); *Morgan v. Morgan*, 1997 WL 672063 (Tenn. Ct. App. Oct. 30, 1997). But none of these cases involved a situation where the time with each parent is precisely equal. The child support guidelines state that they are designed to apply to situations "where children are living primarily with one parent but stay overnight with the other parent at least as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year." Tenn. Comp. R. & Reg., Ch. 1240-2-4-.02(6). The guidelines go on to state that they are designed to consider the actual physical custody of the child, whether such custody is designated as sole or joint, and that when the overnight time is divided more equally, the court will have to make a case-by-case determination as to the appropriate amount of support. *Id.*

The guidelines define the obligee as the parent with whom the children primarily live, and the obligor as the parent with whom the children do not primarily live. Tenn. Comp. R. & Reg., Ch. 1240-2-4-.03(1). The facts of this case do not fall within the ambit of the guidelines, as there is neither an obligee nor an obligor according to the definitions in the rule. We find no case in this jurisdiction involving precisely equal time of custody with both parents. However, the Supreme Court of Kansas issued an administrative order, ordering that where the child's residence is equally divided, "the amount of the lower Net Parental Child Support Obligation is subtracted from the higher amount and the difference is then multiplied by .50. The resulting amount is the child support the party having the higher obligation will pay to the party with the lower obligation." *See Roth v. Roth*, 987 P.2d 1134 (Kan. App. 1999).³ We agree with this approach.

We conclude that since the husband has the child one-half of the time, and since the

³ This is precisely what wife asked the court to award in her proposal in this case.

guidelines seek to ensure that the child gains the benefit of both parents' earning power, it is appropriate to take the difference between what the husband's guideline support obligation would be and what the wife's guideline support obligation would be, and divide that amount in half. Thus, the amount of child support in this case would be \$153.50 per month payable to the wife from the husband. We therefore modify the Trial Court's award of child support to \$153.50 per month.

As to the issue of alimony, the husband argues the wife was not entitled to any award of alimony. He primarily bases his argument on the wife's answer when she was being cross-examined about her equitable interest in the farm that she was not seeking alimony. In that context she was asked if she was entitled to alimony, and she responded that "I don't believe that what I am asking for is called alimony, it is the equity". The Complaint filed by the wife asked for alimony and the proposed settlement presented by her attorney asked for alimony in solido for 36 months.

The Trial Court has "wide discretion" regarding an award of alimony, and is largely determined by the court's findings of fact in consideration of the statutory factors contained in Tenn. Code Ann. §36-5-101(d)(1). The trial court's alimony award should only be reversed by this Court when the trial court's discretion "has manifestly been abused." *Siegel v. Siegel*, 1999 Tenn. App. LEXIS 139 (Tenn. Ct. App. March 5, 1999). See also *Burlew v. Burlew*, 40 S.W.3d 465 (Tenn. 2001). While the Trial Court classified the award as in futuro in its Judgment, the Supreme Court has recognized, however, that there are two types of long-term support, alimony in futuro and alimony in solido, and a difference between the two is the definiteness of the sum ordered to be paid at the time of the award. *Burlew*. It is clear that the Trial Court rejected a rehabilitative award, and the award is for a certain amount to be paid in installments over a period of time, and is not subject to any contingencies. Thus, the award of alimony is in actuality an award in solido. See *Isbell v. Isbell*, 816 S.W.2d 735 (Tenn. 1991). The evidence demonstrates the wife's need and the husband's ability to pay. We find no abuse of the Trial Court's discretion in making this award, which we affirm as an award of alimony in solido.

Finally, the husband argues that the Trial Court erred in its distribution of the marital property. Husband's brief fails to contain the tabulation of property required by Rule 15 of the Rules of the Court of Appeals, and fails to contain any argument regarding the issue as required by Rule 6 of this Court. Regardless of these deficiencies, however, the evidence supports the Trial Court's distribution of the parties' property. The Code instructs the trial court to "equitably divide" the parties' marital property "in proportions as the court deems just." Tenn Code Ann. §36-4-121(a)(1). The statute then lists the factors to be considered, and the law is well-settled that a property distribution does not have to be mathematically equal to be equitable. *Ellis v. Ellis*, 748 S.W.2d 424 (Tenn. 1988.)

In this case, the Trial Court divided the parties' property in virtually equal portions, and the evidence supports the Trial Court's valuation and classification of the property, as well as its basically equal distribution. The Trial Court has broad discretion on this issue and its decision is given great weight on appeal. *Mondelli v. Howard*, 780 S.W.2d 769 (Tenn. Ct. App. 1989). The evidence does not preponderate against the Trial Court's finding on this issue. Tenn R. App. P.

13(d).

The wife argues on appeal that she should receive her fees incurred in defending the Trial Court's Decree. The Trial Court did not award the wife attorney's fees, and fees are usually awarded on appeal in the same manner as they would be at trial, and must be analyzed according to the same alimony factors. *Sannella v. Sannella*, 993 S.W.2d 73 (Tenn. Ct. App. 1999). In denying the wife's requested attorney's fees, the Trial Court found that she had been awarded sufficient assets from which to pay her fees. Accordingly, we likewise decline to award attorney's fees on appeal.

The total cost of the appeal is assessed 75% to Michael David Calhoun, and 25% to Laurel Elise Calhoun, and the cause remanded.

HERSCHEL PICKENS FRANKS, J.